IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-87

FRED KILBRIDE,

Petitioner,

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

LOS ANGELES BOARD OF EDUCATION,

Real Party in Interest

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND DISTRICT

Real Party in Interest, The Los Angeles Board of Education, hereby opposes the Petition for Writ of Certiorari on file herein.

QUESTION PRESENTED

Whether Petitioner may plead causes of action complaining that certain activities of a public elementary school violate the Establishment and Free Exercise Clauses, in that the activities are contrary to the beliefs of the parents and guardians of some of the children attending said school, without having to answer interrogatories directed to the manner in which the activities infringe upon his beliefs or non-beliefs, when it is admitted that he is a parent who is offended in his beliefs or non-beliefs by said activities?

STATEMENT OF THE CASE

In his Statement of the Case Petitioner has accurately set forth the pertinent history of the subject lawsuit and the circumstances which occasion the present petition, except for the following.

First, with respect to the Twenty-

Fifth and Twenty-Sixth Causes of Action (Petition, pages 4-5), Petitioner and his spouse are admitted parents of two children who attend the school in question.

Second, Interrogatory No. 68 (Petition, page 5), is not in issue here. It was answered in the affirmative by Petitioner and his spouse, thus providing the basis for Respondent Court's order that Petitioner provide further answers to Interrogatories 69 and 70.

Finally, it should be noted that Real Party in Interest had, prior to submission of the subject Interrogatories to Petitioner, unsuccessfully moved Respondent Court to strike the subject Causes of Action from the complaint.

ARGUMENT

PETITIONER, HAVING MADE THE SUBJECT CAUSES OF ACTION A PART OF HIS LAW-SUIT, HAS WAIVED ANY RIGHTS OR PRIVILEGES CONCERNING THE SUBJECT MATTER.

It cannot be overemphasized that Petitioner and his spouse have raised the issue concerning the beliefs of some of the parents of some of the children attending the school. Petitioner has made the allegations concerning parental beliefs separate causes of action within the complaint.

Given this fact, it is surely appropriate to inquire as to the basis for Petitioner's specific allegation. As noted above, Real Party in Interest had earlier moved Respondent Court to have the subject causes of action stricken from the complaint. If they

are left in, they should be the proper subject of analysis.

The discovery sought must be seen to meet even the narrowest definition of relevancy. Petitioner clearly falls within the class of persons contemplated by the subject Causes of Action: he is a parent who admits that the programs complained of offend him in his religious beliefs or non-beliefs. The discovery is thus directly relevant to those claims.

Furthermore, the discovery is directly relevant to the issue of Petitioner's standing to sue, especially under the Free Exercise Clause. There is a serious issue (into which Real Party should be entitled to inquire) as to Petitioner's standing to sue in the event he does not allege or intend to show infringement upon his particular religious freedoms. See Abington School District v. Schempp, 374 U.S.

203, 224, Note 9, 83 S.Ct. 1569, 10 L.Ed.2d 844, 859, Note 9 (1963), and cases cited therein.

Petitioner, having made the subject Causes of Action a part of his lawsuit, having made both Establishment and Free Exercise claims, and having expressly admitted being offended in his beliefs or non-beliefs by the programs in question, has waived any rights or privileges concerning the subject matter. As Petitioner himself has pointed out, "Constitutional guarantees may, of course, be waived directly or be deemed waived by conduct * * *," citing Barker v. Wingo 407 U.S. 514, 526, 92 S.Ct. 2182, 33 L.Ed.2d 101, 114 (1972).

Contrary to Petitioner's claim that the order of Respondent Court in favor of discovery "imposes a religious test" (Petition, page 7) or "chills" or otherwise abridges the exercise of constitutional rights (Ibid., page 9),

the Respondent Court's order is not in fact forcing Petitioner to do anything, nor is it impairing Petitioner's ability to exercise his rights.

Were the Twenty-Fifth and Twenty-Sixth Causes of Action the only possible legal basis for maintaining the action, Petitioner might have an argument that an impermissible condition upon the exercise of his rights would be involved, and the Court might be put to the test of balancing the claimed right of privacy against the prosecution of the lawsuit and the discovery rights of Real Party in Interest.

But even in that case both the waiver and standing arguments exist as compelling reasons why Real Party in Interest would nonetheless be entitled to the discovery it seeks.

When, as in the present case, there are 42 causes of action predicated

upon the same event (certain songs being sung at a holiday concert, and related matter), it is hardly possible to argue that the discovery sought impairs, burdens, abridges, or chills the exercise of any conceivable constitutional right. On the contrary, Petitioner seeks to prevent inquiry into an area the subject matter of which he has raised.

There is no constitutional right to place a cause of action in a lawsuit while at the same time attempting to forestall an inquiry into the subject matter of that cause of action. It would thus appear more accurate to say that Petitioner attempts to abridge the rights of Real Party in Interest.

WHEREFORE, Real Party in Interest prays that this Court deny the Petition for Writ of Certiorari.

DATED: August 11, 1975

JOHN H. LARSON
County Counsel

By Allan B. McKittrick
Allan B. McKittrick
Division Chief

Attorneys for Real
Party In Interest

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am a citizen of the United States and a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 450 North Grand Avenue, Room A-333, Los Angeles, California 90012.

On August 13, 1975, pursuant to Rules 33.1 and 33.3(c) of Rules of the Supreme Court, I served the within BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL, STATE OF CALIFORNIA, SECOND DISTRICT on the Petitioner in said action, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, at the United States Post Office, Los Angeles, California, addressed as follows:

SUPERIOR COURT, County of Los Angeles, Department North Central B, 300 E. Olive Avenue, Burbank, California 91502

FRED KILBRIDE, Attorney at Law, 403 West College Street, Los Angeles, California 90012

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 13, 1975, at Los Angeles, California.

Jimmie Curtis

Subscribed and sworn to before me this 13th day of August, 1975.

Yolanda Guzman
Notary Public in and for the County of Los Angeles State of California

OFFICIAL SEAL
YOLANDA GUZMAN
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My Commission Expires Dec. 1, 1977